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RE WISUN SOON; EX P WONG KOK POH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-2229-2007]
B 3 JANUARY 2008

CIVIL PROCEDURE: *Stay of proceedings - Appeal against - Order for a stay of subsequent presentation of bankruptcy notice unless costs to be paid by judgment creditors to judgment debtor be taxed and paid - Whether unjust and inappropriate*

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This was an appeal by the judgment creditors against the decision of the senior assistant registrar in ordering a stay of any subsequent presentation of a bankruptcy notice unless the cost which was to be paid by the judgment creditors to the judgment
D debtor was first taxed and paid. The order arose from the judgment creditors' application to withdraw a bankruptcy notice on account of certain errors. In granting the application, the senior assistant registrar ordered that no further bankruptcy proceedings should commence against the judgment debtor unless the cost
E incurred in the judgment creditors' application as well as the cost incurred in allowing the judgment debtor's application to set aside the bankruptcy notice which was fixed for hearing at a later date be taxed and paid. The grounds of appeal were that (i) it was unjust and should not have been granted and (ii) the order would
F put the judgment creditors in a disadvantaged position if the judgment debtor did not proceed to tax his costs then they would be unable to file a fresh petition.

Held:

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(1) It would be inappropriate under the circumstances to order that the costs should first be taxed and paid as this would give the judgment debtor the opportunity to forestall the commencement of the new bankruptcy proceeding which the
H judgment creditors intended to refile, by delaying the taxation of his bill of costs. Thus, the appropriate and just order should be to compel the judgment debtor to tax his costs within two months and the judgment creditor to pay the taxed costs within two weeks subject to any adjustment. (paras 5 & 6)

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[Order accordingly.]

For the judgment creditors - Amir Salleh (Karen Lynn with him); M/s Kadir Andri & Partners
For the judgment debtor - Jeev Anand; M/s Asha Aida Akhtar & Jeev

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

This is my oral judgment: ***(ex-tempore)***

[1] This is an appeal by the judgment creditors against the decision of the senior assistant registrar in ordering a stay of any subsequent presentation of a bankruptcy notice unless the cost which is to be paid by the judgment creditors to the judgment debtor is first taxed and paid.

[2] The order arose from the judgment creditors' application to withdraw a bankruptcy notice in petition D8-29-2229-2007 on account of certain errors. In granting the application the senior assistant registrar ordered that no further bankruptcy proceedings shall be commenced against the judgment debtor unless the cost incurred in the judgment creditors' application as well as the cost incurred in allowing the judgment debtor's application to set aside the bankruptcy notice which was fixed for hearing at a later date.

[3] The grounds of the appeal are as follows:

1. We have agreed to pay both costs but the order to pay them before we can file the subsequent bankruptcy proceeding is unjust as it should not have been granted. It should be granted only if the judgment creditors had acted in a vexatious manner in refusing to pay the costs and yet proceed to file a fresh bankruptcy proceeding. We have acted in good faith in withdrawing our bankruptcy notice and consented to all costs occasioned by their error.

2. It is also unjust because the order would put us in a disadvantaged position. If the judgment debtor does not proceed to tax his costs then we would not be able to file a fresh petition.

[4] Reply by counsel for the judgment debtor:

1. It is trite principle of law that if one party fails in an action and has not paid cost of that action it would not be allowed to commence another action against the same party of a similar nature.

2. There is no issue of unjustness because the judgment debtor has not been given a chance to tax his costs.

Findings And Decision

[5] There should be modification of the order of the senior assistant registrar. It is not wrong for her to have ordered the judgment creditors to pay the costs of the judgment debtor before the judgment creditors commenced a new bankruptcy proceeding. But it would be inappropriate under the circumstances to order that the costs should first be taxed and paid as this would give the judgment debtor the opportunity to forestall the commencement of the new bankruptcy proceeding which the judgment creditors intend to refile, by delaying the taxation of his bill of costs.

[6] The appropriate and just order should be to compel the judgment debtor to tax his costs within two months. The judgment creditors shall pay the taxed costs within two weeks subject to any adjustment that may be made later by the judge in the event that the costs are reviewed. The judgment debtor's entitlement to costs would be forfeited should he fail to submit his bill of costs for taxation within a month from today. No order as to costs.